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DEC 10 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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INSURANCE COMPANY OF THE
6 STATE OF PENNSYLVANIA

E-filing

7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

EDL

10
11 KENYON CONSTRUCTION, INC., an Arizona
corp., and KENYON PLASTERING, INC., a
12 California corp.,

13 Plaintiffs,

14 v.

15 AMERICAN SAFETY RISK RETENTION
GROUP, INC., a Vermont corp., AMERICAN
16 SAFETY CASUALTY INSURANCE
COMPANY, a Delaware corp.; THE
17 INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA, Pennsylvania corp.;
18 LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corp.; AMERICAN
19 GUARANTEE & LIABILITY INSURANCE
COMPANY, a New York corp.; and DOES 1 -
20 15,

21 Defendants.

CASE NO.

5266

NOTICE OF REMOVAL OF CIVIL
ACTION UNDER 28 U.S.C. SECTIONS
1332 AND 1441(a)
[DIVERSITY JURISDICTION];
DEMAND FOR JURY TRIAL

22
23 TO THE CLERK OF THE ABOVE-ENTITLED COURT:

24 PLEASE TAKE NOTICE that defendant INSURANCE COMPANY OF THE
25 STATE OF PENNSYLVANIA (hereinafter "ISOP") hereby removes to this Court the state action
26 described below:

27 1. ISOP is a defendant in the civil action commenced on November 8, 2004 in the
28 Superior Court of the State of California, County of San Mateo, Case No.

11731

-1-

1 CIV442983, entitled Kenyon Construction v. American Safety Risk Retention
2 Group, Inc., et al.

- 3 2. ISOP was served with a copy of the Complaint on November 10, 2004. A copy of
4 the Complaint is attached hereto as Exhibit "1" and is incorporated as part of this
5 notice.
- 6 3. This action is a civil action of which this Court has original jurisdiction under 28
7 U.S.C. section 1332, and is one that may be removed to this Court by ISOP pursuant
8 to the provisions of 28 U.S.C. section 1441, subdivision (a), in that it is a civil action
9 wherein the matter in controversy exceeds the sum of \$75,000 exclusive of interest
10 and costs, and is between citizens of different states. This Court further has
11 jurisdiction under the Declaratory Relief Act, 28. U.S.C. section 2201 in that an
12 actual controversy exists among the parties as alleged in the Complaint.
- 13 4. The fact that the amount in controversy exceeds the minimum requirement for
14 diversity jurisdiction can be determined by the nature of the claims and the amount
15 in dispute as described in the Complaint. Specifically, the Complaint seeks, at a
16 minimum, a declaration (1) reallocating a \$995,000 payment by Liberty Mutual
17 under one of several policies (Complaint, ¶¶ 25, 26 and 49), (2) defeating American
18 Safety's alleged contention that plaintiff must pay a \$50,000 self insured retention
19 for each house in the project at issue in the Ryland action (Complaint, ¶¶ 47 and 52)
20 and (3) establishing that various insurer defendants had a duty to defend the
21 underlying actions alleged in the complaint when its defense fees and costs allegedly
22 equal or exceed its \$1 million SIR aggregate. (Complaint, ¶¶ 50, 51, 54 and 55.)
- 23 5. At the time of the commencement of this action, and at all times since, ISOP has
24 been, and still is, a corporation of the State of New York, being incorporated under
25 the laws of New York, and has had and continues to have its principal place of
26 business in New York. Defendant American Safety Risk Retention Group, Inc. is a
27 Vermont corporation with its principal place of business in Georgia. (Complaint, ¶
28 3.) Defendant American Safety Casualty Insurance Company is a Delaware

corporation with its principal place of business in Georgia. (Complaint, ¶ 3.) Defendant Liberty Mutual Insurance Company is a Massachusetts corporation with its principal place of business in Massachusetts. (Complaint, ¶ 5.) Defendant American Guarantee & Liability Insurance Company is a New York Corporation with its principal place of business in Illinois. Plaintiff Kenyon Construction, Inc. is an Arizona corporation with its principal place of business in Arizona. (Complaint, ¶ 1.) Plaintiff Kenyon Plastering, Inc. is a California corporation with its principal place of business in Arizona. (Complaint, ¶ 2.)

6. This action was brought in the State of California. None of these corporate defendants were, at the time of the institution of this action, and are not now, a corporation incorporated under the laws of the State of California or the State of Arizona, and none of them had, at the time of the institution of this action, and none of them have now, their principal place of business in California or Arizona.

7. Counsel for all defendants have agreed to join in this Notice of Removal. Attached as Exhibit "2" is a true and correct copy of the Notice of Joinder in Removal from Liberty Mutual Insurance Company. Attached hereto as Exhibit "3" is a true and correct copy of the Notice of Joinder in Removal from American Guarantee & Liability Insurance Company. Attached hereto as Exhibit "4" is a true and correct copy of the Notice of Joinder in Removal from American Safety Risk Retention Group, Inc. and American Safety Casualty Insurance Company.

DEMAND FOR JURY TRIAL

ISOP hereby demands a trial by jury.

Dated: December 10, 2004

HAYES, DAVIS, ELLINGSON, McLAY & SCOTT

By 

STEPHEN M. HAYES
STEPHEN P. ELLINGSON
Attorneys for Defendant
THE INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA

EXHIBIT 1

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and KENYON PLASTERING, INC.

ENDORSED FILED
SAN MATEO COUNTY

NOV 08 2004

Clerk of the Superior Court
By S. BUCHANAN
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO – UNLIMITED JURISDICTION

KENYON CONSTRUCTION, INC.,
an Arizona corporation, and KENYON
PLASTERING, INC., a California
corporation,

Plaintiffs,

v.

AMERICAN SAFETY RISK RETENTION
GROUP, INC., a Vermont corporation,
AMERICAN SAFETY CASUALTY
INSURANCE COMPANY, a Delaware
corporation; THE INSURANCE COMPANY
OF THE STATE OF PENNSYLVANIA, a
Pennsylvania corporation, LIBERTY
MUTUAL INSURANCE COMPANY, a
Massachusetts corporation, AMERICAN
GUARANTEE & LIABILITY INSURANCE
COMPANY, a New York corporation, and
Does 1-15,

Defendants.

No.:

CIV 442983

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Kenyon Construction, Inc. and Kenyon Plastering, Inc. (sometimes referred to
collectively as "Kenyon") allege as follows:

The Parties

1
2 1. Plaintiff Kenyon Construction, Inc., is an Arizona corporation doing
3 business in California.

4 2. Plaintiff Kenyon Plastering, Inc., is a California corporation doing business
5 in California.

6 3. Kenyon is informed and believes and thereon alleges that defendant
7 American Safety Risk Retention Group, Inc. ("ASRRG"), is a Vermont corporation and
8 doing business in California. Kenyon is informed and believes and thereon alleges that
9 defendant American Safety Casualty Insurance Company ("ASCIC") is a Delaware
10 corporation doing business in California. The insurance policy issued by ASRRG as
11 alleged below was endorsed to include an express guarantee by ASCIC of ASRRG's
12 performance under that policy. Therefore, all of the allegations and prayers contained in
13 this complaint as to ASRRG apply equally to ASCIC, as ASRRG's guarantor and surety,
14 without any further express allegation as to ASCIC.

15 4. Kenyon is informed and believes and thereon alleges that defendant The
16 Insurance Company of the State of Pennsylvania ("ICSOP") is a Pennsylvania
17 corporation with its principal place of business in New York and doing business in
18 California.

19 5. Kenyon is informed and believes and thereon alleges that defendant
20 Liberty Mutual Insurance Company ("Liberty") is a Massachusetts corporation with a
21 principal place of business in Massachusetts and doing business in California.

22 6. Kenyon is informed and believes and thereon alleges that defendant
23 American Guarantee & Liability Insurance Company ("American Guarantee") is a New
24 York corporation doing business in California.

25 7. Kenyon is unable to ascertain the true names and identities of those
26 defendants fictitiously designated as Does 1 through 15, inclusive, and therefore names
27 said defendants fictitiously pursuant to C.C.P. § 474. Kenyon will pray leave of court to
28

1 amend this complaint and all subsequent pleadings to insert the true names and
 2 capacities of these fictitiously named defendants when ascertained. The allegations and
 3 controversies alleged below with respect to the named defendants apply equally to Does
 4 1 through 15.

5 Kenyon's Insurance Program

6 8. Kenyon's liability insurance program is described below. The allegations
 7 below regarding the program and various insurance policies only are descriptive only
 8 and do not supersede the actual terms of the policies. Each of the Liberty primary
 9 policies was subject to limits of \$1 per occurrence, \$2 million for completed operations,
 10 and \$2 million in the aggregate; the ASRRG policy was subject to limits of \$1 per
 11 occurrence, \$1 million for completed operations, and \$2 million in the aggregate. The
 12 umbrella or excess policies were subject to varying limits. The following chart
 13 illustrates Kenyon's program from July 1, 1995, through July 1, 2001:
 14

15 7/1/95 -7/1/96	16 7/1/96 -7/1/97	17 7/1/97- 7/1/98	18 7/1/98- 7/1/99	19 7/1/99- 7/1/00	20 7/1/00- 7/1/01
21 Liberty umbrella excess policy no. TH1- 161-037184- 025/4	22 Liberty umbrella excess policy no. TH1- 161-037184- 026/0	23 Liberty umbrella excess policy no. TH1- 161-037184- 027/8.	24 American Guarantee umbrella excess policy no. AUO- 2878840-01	25 ICSOP umbrella excess policy no. 4299-6606.	26 National Union umbrella excess policy no. BE 7398517 or AISLIC no. 3468208
27 Liberty primary policy no. TB7-161- 037184-015	28 Liberty primary policy no. TB7-161- 037184-016	Liberty primary policy no. TB7-161- 037184-017	Liberty primary policy no. TB7-161- 037184-018	Liberty primary policy no. TB7-161- 037184-019	ASRRG primary policy no. XGI-00- 1747-001
("the 1st Liberty primary policy")	("the 2nd Liberty primary policy")	("the 3rd Liberty primary policy")	("the 4th Liberty primary policy")	("the 5th Liberty primary policy")	("the ASRRG primary policy")

The Liberty Primary Policies

9. As indicated in the chart in Paragraph 8, in return for premiums paid by Kenyon, Liberty issued five consecutive primary policies to Kenyon (the "Liberty primary policies"). The policy numbers, effective dates, and policy limits for each of the Liberty primary policies are set forth in Paragraph 8.

10. Under each of the Liberty primary policies, Liberty agreed to indemnify Kenyon for sums Kenyon becomes legally obligated to pay as damages because of property damage occurring during the policy period.

11. Under each of the Liberty primary policies, Liberty agreed to defend Kenyon against claims potentially alleging that Kenyon is legally obligated to pay damages because of property damage occurring during the policy period.

The ASRRG Primary Policy

12. As indicated in the chart in Paragraph 8, in return for premiums paid by Kenyon, ASRRG issued a primary policy to Kenyon (the "ASRRG primary policy"). The policy number, effective dates, and policy limits for the ASRRG primary policy are set forth in Paragraph 8.

13. Under the ASRRG primary policy, ASRRG agreed to indemnify Kenyon for sums Kenyon becomes legally obligated to pay as damages because of property damage caused by an occurrence, if the property damage occurs during the policy period.

14. Under the ASRRG primary policy, ASRRG agreed to defend Kenyon against claims potentially alleging that Kenyon is legally obligated to pay damages because of property damage occurring during the policy period.

15. The ASRRG policy includes an endorsement (form number ES 98 03 08 99) entitled "Amended Definitions Endorsement, Occurrence or Duty to Defend" (the "amended-definitions endorsement"). This endorsement states in part that property damage that "commenced prior to the effective date of [the] insurance will be deemed to have happened prior to, and not during, the term of [the] insurance."

1 16. The ASRRG policy includes an endorsement (form number ES 98 08 08
2 99) entitled "Pre-Existing Injury or Damage Exclusion" (the "pre-existing-injury
3 exclusion") that generally and without admission thereof purports to exclude coverage
4 for property damage commencing before the policy period, as provided in the
5 endorsement.

6 17. The ASRRG policy includes a "Self-Insured Retention" endorsement
7 (form number ES 98 01 08 99). This endorsement generally and without admission
8 thereof provides that the policy is subject to a self-insured retention ("SIR") of \$50,000
9 per occurrence, with a \$1 million overall SIR aggregate.

10 18. The ASRRG includes an "Other Insurance Amendatory Endorsement"
11 under form ES 98 06 08 99 (the "other-insurance endorsement") that generally and
12 without admission thereof purports to modify the policy's other-insurance clause to
13 render the ASRRG policy excess over any other insurance available to Kenyon whether
14 primary, excess, contingent or on any other basis and regardless of the nature, kind, date
15 of issuance, or limits of such other insurance.

16 The ICSOP Excess Policy

17 19. As indicated in the chart in Paragraph 8, in return for premiums paid by
18 Kenyon, ICSOP issued an excess policy to Kenyon. The policy number and effective
19 dates for the ICSOP excess policy are set forth in Paragraph 8.

20 20. The ICSOP policy requires that ICSOP indemnify Kenyon for sums
21 Kenyon becomes legally obligated to pay as damages because of property damage
22 occurring during the policy period, but only if the underlying policy limits have been
23 exhausted.

24 21. The ICSOP policy requires that ICSOP defend Kenyon against claims
25 alleging that Kenyon potentially is legally obligated to pay damages because of property
26 damage occurring during the policy period, but only if the underlying policy limits have
27 been exhausted.
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The Villas Action

22. On or about November 17, 2003, Kenyon Plastering, Inc. was named a defendant in an eighth amended complaint filed by Villas on Travis Condominium Owners' Association, Inc. in the action styled *Villas on Travis Condominium Owners' Association, Inc. v. Villas by Renaissance, Ltd., et al.*, action no. GN102070, in the 53rd Judicial District Court of Travis County, Texas (the "Villas action").

23. The Villas action arose *inter alia* from property damage at a condominium project allegedly caused by the supposedly defective workmanship of Kenyon and others.

24. Liberty agreed to defend Kenyon in connection with the Villas action under one or more of the Liberty primary policies.

25. During the course of the Villas action, defense counsel hired by Liberty to defend Kenyon moved for total or partial summary judgment against the plaintiffs, arguing that the Villas action was barred under the applicable statute of limitations. In this motion, Kenyon asserted *inter alia* that the property damage at the Villas project began in February 1997 and that plaintiffs' claim against Kenyon was therefore time-barred. The court in the Villas action orally granted the motion. Before any motion to reconsider or any appeal from the ruling, Liberty paid Villas plaintiffs \$995,000 to resolve all claims against Kenyon in the Villas action.

26. Liberty allocated its entire \$995,000 payment to the fifth Liberty primary policy.

27
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The Gardens Action

27. On or about June 2, 2003, Kenyon Plastering, Inc. and Kenyon Construction, Inc. were named as third-party defendants in a third-party complaint filed by Browning Construction, Inc. in the action styled *Garden Partners, Ltd. v. Browning Construction Co., et al.*, action no. GN101740, in the 200th Judicial District Court of Travis County Texas, relating to a condominium complex known as the Gardens at West

1 Seventh ("the Gardens action").

2 28. On or about May 10, 2004, Kenyon Plastering, Inc. a/k/a Kenyon
3 Construction, Inc. was named as a defendant in a first-amended complaint filed by the
4 Gardens at West Seventh Homeowners Association, Inc. and others in the Gardens
5 action.

6 29. The above-referenced first-amended complaint alleges *inter alia* that
7 Kenyon and others negligently caused property damage to the condominium complex,
8 and Browning's third-party complaint alleges that Kenyon and others owe Browning
9 contribution or indemnity for Browning's liability, if any, in the Gardens action.

10 30. Kenyon is informed and believes that the alleged property damage
11 potentially occurred during the fourth Liberty primary policy period through the ASRRG
12 policy period.

13 31. Kenyon has requested that Liberty, ICSOP, ASRRG, and Does 1-5
14 provide it with a defense and indemnity against the third-party complaint and first-
15 amended complaint in the Gardens action.

16 32. Liberty initially agreed to provide Kenyon with such a defense, but later
17 withdrew its defense, claiming, as Kenyon understands it, that the 5th Liberty policy was
18 exhausted through the payment of other claims, including the settlement of the Villas
19 action.

20 33. Thus far, ICSOP, ASRRG, and Does 1-5 have each refused to provide
21 Kenyon with a defense or indemnity against the third-party complaint and first-amended
22 complaint in the Gardens action.

23 34. In refusing to provide Kenyon with a defense, ICSOP has asserted, in part,
24 that Liberty's 5th year policy is not actually exhausted because Liberty was wrong to
25 allocate its entire settlement payment in the Villas action to the 5th Liberty primary
26 policy.

27 35. ASRRG has asserted, in part, that the other-insurance endorsement in its
28

1 policies may eliminate Kenyon's right to coverage.

2 36. ASRRG also has asserted that, because Kenyon completed its work on the
3 condominium project before the first ASRRG primary policy incepted, the pre-existing-
4 injury exclusion and amended-definitions endorsement eliminate any potential for
5 coverage.

6 **The Ryland Action**

7 37. On or about September 19, 2003, Ryland Homes of California, Inc. named
8 Kenyon Plastering, Inc. as a defendant in a complaint in the action styled *Ryland Homes*
9 *of California v. Kenyon Construction, et al.*, action no. CIV434221, Superior Court of
10 the State of California, San Mateo County (the "Ryland action").

11 38. The plaintiffs in the Ryland action allege that Kenyon negligently caused
12 property damage to various homes at a multi-home construction project in Pacifica.

13 39. Kenyon is informed and believes that the alleged property damage
14 potentially occurred during the fifth Liberty primary policy period through the ASRRG
15 policy period.

16 40. Kenyon has requested that Liberty, ICSOP, ASRRG, and Does 6-10
17 provide it with a defense and indemnity against the third-party complaint and first-
18 amended complaint in the Ryland action. In addition, per ASRRG's request, on or
19 about May 2004, Kenyon mailed ASRRG a \$50,000 check, representing the \$50,000 SIR
20 under the first ASRRG primary policy. ASRRG cashed this check shortly thereafter.

21 41. Liberty initially agreed to provide Kenyon with a defense in the Ryland
22 action, but later withdrew, claiming, as Kenyon understands it, that the 5th Liberty policy
23 was exhausted through the payment of other claims, including the settlement of the
24 Villas action.

25 42. Thus far, ICSOP and Does 6-10 have each failed to provide Kenyon with a
26 defense or indemnity against the third-party complaint and first-amended complaint in
27 the Ryland action.
28

1 43. In refusing to provide Kenyon with a defense, ICSOP has asserted, in part,
2 that Liberty's 5th year policy is not actually exhausted, i.e., that Liberty was wrong to
3 allocate its entire settlement payment in the Villas action to the 5th Liberty primary
4 policy.

5 44. As for ASRRG, on or about May 16, 2003, its coverage counsel sent a
6 letter to Kenyon, stating that ASRRG would not provide Kenyon with a defense in the
7 Ryland action. On or about July 23, 2004, after many communications between Kenyon
8 and ASRRG and their respective coverage counsel concerning ASRRG's refusal to
9 defend, ASRRG's coverage counsel sent another letter, advising *inter alia* that ASRRG
10 would provide Kenyon with a defense "if all other carriers have properly withdrawn their
11 defense," and that "ASRRG has reserved and is reserving all of its rights under the
12 policy," as well as the "right to withdraw its defense at any point in time it becomes
13 apparent there is no longer a duty to defend." As of September 2004, however, ASRRG
14 had yet to retain any defense counsel on Kenyon's behalf. On or about September 30,
15 2004, ASRRG's coverage counsel advised Kenyon that ASRRG intended to revisit the
16 coverage position set forth in its letter of July 23, 2004, and thus was not prepared to
17 retain counsel to defend Kenyon. In or about October 2004, ASRRG's coverage
18 counsel sent yet another letter, advising of ASRRG's agreement to retain defense
19 counsel after all. Thus far, however, ASRRG has not actually paid any defense fees and
20 costs. Moreover, as noted, ASRRG's agreement to defend Kenyon is under reservation
21 of rights.

22 45. In the meantime, ASRRG has asserted that the other-insurance
23 endorsement in its policies may eliminate Kenyon's right to coverage.

24 46. ASRRG also has asserted that, for those homes on which Kenyon
25 completed its work before the first ASRRG primary policy incepted, the pre-existing-
26 injury exclusion and amended-definitions endorsement eliminate any potential for
27 coverage.
28

1 47. ASRRG also has asserted *inter alia* that: (a) as a condition of coverage,
 2 Kenyon may be required to pay a separate \$50,000 SIR for each home at issue in the
 3 Ryland action, rather than a single \$50,000 SIR for the entire claim; (b) under the
 4 policies, ASRRG may apply Kenyon's \$50,000 SIR payment not only toward any
 5 settlement or judgment, but also toward fees and costs incurred defending Kenyon; and
 6 (c) ASRRG need not provide Kenyon with a credit toward its \$50,000 SIR (or \$1 million
 7 SIR aggregate) for defense-costs payments made by Kenyon before ASRRG begins
 8 defending Kenyon.

9
 10 **First Cause of Action for Declaratory Relief**
 11 (all defendants)

12 48. Actual controversies have arisen and now exist among Kenyon, Liberty,
 13 ASRRG, ICSOP, American Guarantee, and Does 1-10, as set forth below.

14
 15 **First Controversy:**
 16 **Whether Liberty properly allocated its payment of the Villas settlement solely to the 5th**
 17 **Liberty primary policy.**

18 49. Kenyon contends that Liberty erred in allocating its settlement payment in
 19 the Villas action solely to the 5th Liberty primary policy, and that some portion of
 20 Liberty's payment should be reallocated to the second, third, and fourth Liberty primary
 21 policies. Kenyon is informed and believes that Liberty and American Guarantee contend
 22 or will contend to the contrary.

23
 24 **Second Controversy:**
 25 **Whether one or more of the defendant insurers**
 26 **owe a duty to defend Kenyon in the Ryland action**

27 50. Kenyon contends that (a) Liberty owes a duty to defend all claims against
 28 Kenyon in the Ryland action; or (b) ASRRG owes Kenyon a duty to defend all claims
 against Kenyon in the Ryland action; or (c) that ICSOP owes Kenyon a duty to defend all

1 claims against Kenyon in the Ryland action; or (d) Does 6-10 owe Kenyon a duty to
 2 defend all claims against Kenyon in the Ryland action, or (e) some combination of
 3 Liberty, ASRRG, ICSOP, and Does 6-10 owe Kenyon a duty to defend all claims asserted
 4 against Kenyon in the Ryland action. Kenyon is informed and believes that each among
 5 Liberty, ICSOP, ASRRG, and Does 6-10 contends, or will contend, that it owes no duty to
 6 defend Kenyon against any claim in the Ryland action.

7
 8 Third Controversy:

9 Whether one or more of the defendant insurers
 10 owe a duty to defend Kenyon in the Gardens action

11 51. Kenyon contends that (a) Liberty owes a duty to defend Kenyon against all
 12 claims against Kenyon in the Gardens action; or (b) ASRRG owes Kenyon a duty to
 13 defend all claims against Kenyon in the Gardens action; or (c) ICSOP owes Kenyon a duty
 14 to defend all claims against Kenyon in the Gardens action; or (d) Does 1-5 owe Kenyon a
 15 duty to defend all claims against Kenyon in the Gardens action, or (e) some combination
 16 of Liberty, ASRRG, ICSOP, and Does 1-5 owe Kenyon a duty to defend all claims against
 17 Kenyon in the Gardens action. Kenyon is informed and believes that each among Liberty,
 18 ASRRG, ICSOP, and Does 1-5 contends that it owes no duty to defend Kenyon against
 19 any claim in the Gardens action.

20 Fourth Controversy:

21 Whether, as a condition of ASRRG's defense obligation in the Ryland action, Kenyon
 22 must pay ASRRG more than one \$50,000 SIR

23 52. Kenyon contends that, under the ASRRG policies, it is required to pay only
 24 one \$50,000 SIR in connection with the Ryland action. Kenyon is informed and believes
 25 that ASRRG contends that, as a condition of its defense obligation in the Ryland action,
 26 Kenyon may be required to pay a separate \$50,000 SIR for each home at issue in the
 27 Ryland action.

28 Fifth Controversy:

1 Whether, in the Ryland action and the Gardens action, ASRRG may apply
 2 Kenyon's SIR payment toward defense costs.

3 53. Kenyon contends that, with respect to the Ryland action, the Gardens action,
 4 and any other action for which ASRRG owes coverage to Kenyon, the ASRRG policies
 5 permit ASRRG to apply Kenyon's SIR payment only toward a settlement or satisfaction
 6 of a judgment in the action, not toward fees and costs incurred defending Kenyon against
 7 the action. Kenyon is informed and believes that ASRRG contends to the contrary.

8 Sixth Controversy:

9 Whether, in the Ryland action and the Gardens action, Kenyon should receive a credit
 10 toward ASRRG's \$50,000 SIR and \$1 million SIR Aggregate based on
 11 Kenyon's costs incurred before requesting that ASRRG defend.

12 54. Kenyon contends that, with respect to the Ryland action, the Gardens action,
 13 and any other action for which ASRRG ultimately owes a duty to defend Kenyon, the
 14 ASRRG policies require that ASRRG provide Kenyon with a credit toward the \$50,000
 15 SIR and \$1 million SIR aggregate for any and all reasonable defense fees and costs
 16 incurred by Kenyon to defend the action before Kenyon requests that ASRRG provide it
 17 with a defense in the action. Alternatively, Kenyon contends that ASRRB must
 18 reimburse Kenyon for such fees and costs. Kenyon is informed and believes that
 19 ASRRG contends to the contrary.

20 Seventh Controversy:

21 Whether, in the Ryland action and the Gardens action, Kenyon should receive a credit
 22 toward ASRRG's \$50,000 SIR and \$1 million SIR Aggregate based on
 23 Kenyon's costs incurred after requesting that ASRRG defend.

24 55. Kenyon contends that, with respect to the Ryland action, the Gardens action,
 25 and any other action for which ASRRG ultimately owes a duty to defend Kenyon, the
 26 ASRRG policies require that ASRRG provide Kenyon with a credit toward the \$50,000
 27 SIR and \$1 million SIR aggregate for any and all reasonable defense fees and costs
 28 incurred by Kenyon to defend the action between the time that Kenyon first requests that
 ASRRG provide it with a defense in the action and the time that ASRRG begins

1 providing such a defense. Alternatively, Kenyon contends that ASRRB must reimburse
 2 Kenyon for such fees and costs. Kenyon is informed and believes that ASRRG contends
 3 to the contrary.
 4

5 Eighth Controversy:

6 Application of ASRRG's pre-existing-injury exclusion and
 7 amended-definitions endorsement.

8 56. Kenyon is informed and believes that ASRRG contends that the pre-
 9 existing-injury exclusion and amended-definitions endorsement eliminate any potential
 10 for coverage with respect to homes or other buildings (including condominium
 11 complexes) on which Kenyon completed its work before the ASRRG primary policy
 12 incepted. Kenyon contends to the contrary.

13 57. Kenyon requests this court to make and enter its binding judicial
 14 declarations in accordance with Kenyon's contentions set forth above, and otherwise
 15 generally to declare the rights and obligations of the parties hereto under the various
 16 insurance policies alleged in this complaint with respect to the rights and duties of any or
 17 all of the parties hereto with regard to the Gardens and Ryland actions.

18 WHEREFORE, Kenyon prays for judgment as follows:

19 a. That the court make and enter its binding judicial declarations of the
 20 respective rights and duties of the parties in accordance with Kenyon's contentions set
 21 forth above;

22 b. That Kenyon be awarded its costs of suit incurred herein; and
 23

24 ///

25 ///

1 c. For such other and further relief as the court deems just and proper.
2
3

4 NIELSEN, HALEY & ABBOTT LLP
5

6
7 November 8, 2004

8 By: 
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Jennifer S. Cohn

Attorney for Plaintiffs

10 KENYON CONSTRUCTION, INC. and
11 KENYON PLASTERING, INC.
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EXHIBIT 2

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7 Attorneys for Defendant
8 LIBERTY MUTUAL INSURANCE COMPANY

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 KENYON CONSTRUCTION, INC.,
12 an Arizona corporation, and
13 KENYON PLASTERING, INC., a
14 California corporation,

15 Plaintiff,

16 v.

17 AMERICAN SAFETY RISK
18 RETENTION GROUP, INC., a
19 Vermont corporation, AMERICAN
20 SAFETY CASUALTY INSURANCE
21 COMPANY, a Delaware
22 corporation, THE INSURANCE
23 COMPANY OF PENNSYLVANIA, a
24 Pennsylvania corporation,
25 LIBERTY MUTUAL INSURANCE
26 COMPANY, a Massachusetts
27 corporation, AMERICAN
28 GUARANTEE & LIABILITY
INSURANCE COMPANY, a New
York corporation, and Does 1-15,

Defendants.

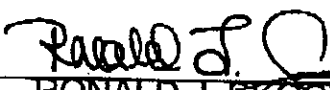
CASE NO.

LIBERTY MUTUAL
INSURANCE COMPANY'S
NOTICE OF JOINDER IN
REMOVAL OF CIVIL ACTION

1 Defendant Liberty Mutual Insurance Company hereby joins in co-
2 defendant Insurance Company of the State of Pennsylvania's Notice of
3 Removal of Civil Action Under 28 U.S.C. Sections 1332 and 1441(a)
4 [Diversity Jurisdiction].
5
6

7 DATED: December 7, 2004

KERN AND WOOLEY LLP

8
9 By: 
10 RONALD J. SKOCYPEC

11 Attorneys for Defendant
12 LIBERTY MUTUAL INSURANCE
13 COMPANY
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28

CASE NAME: Kenyon Const., Inc. v. American Safety Risk Retention Group, Inc., et al.
ACTION NO.:

PROOF OF SERVICE

I am a citizen of the United States. My business address is 203 Redwood Shores Pkwy., Ste. 480, Redwood Shores, California 94065. I am employed in the County of San Mateo where this service occurs. I am over the age of 18 years, and not a party to the within cause. I am readily familiar with my employer's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business.

On the date set forth below, following ordinary business practice, I served a true copy of the foregoing document(s) described as:

**LIBERTY MUTUAL INSURANCE COMPANY'S
 NOTICE OF JOINDER IN REMOVAL OF CIVIL ACTION**

- ☐ (BY FAX) by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.
- ☒ (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Redwood City, California.

Jennifer S. Cohn, Esq.
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Attorneys for Plaintiffs
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KENYON PLASTERING, INC.

Attorneys for Defendant
AMERICAN SAFETY RISK
RETENTION GROUP, INC.

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Ronald Skocypec, Esq.
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 Facsimile: (310) 824-4548

Attorneys for Defendant
AMERICAN GUARANTEE &
LIABILITY INSURANCE COMPANY

Attorneys for Defendant
LIBERTY MUTUAL INSURANCE
COMPANY

- ☒ (Federal) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 10, 2004, at Redwood City, California.


 Abigail Bowman

EXHIBIT 3

12/08/2004 09:32 1

HAYES DAVIS

PAGE 03/03

1 DEBRA PUEBLA (SBN 126934)
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4 Los Angeles, CA 90017
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Attorneys for Defendant

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

9 KENYON CONSTRUCTION, INC., an Arizona
10 corp., and KENYON PLASTERING, INC., a
11 California corp.,

Plaintiffs,

v.

13 AMERICAN SAFETY RISK RETENTION
14 GROUP, INC., a Vermont corp., AMERICAN
15 SAFETY CASUALTY INSURANCE
16 COMPANY, a Delaware corp.; THE
17 INSURANCE COMPANY OF THE STATE OF
18 PENNSYLVANIA, Pennsylvania corp.;
19 LIBERTY MUTUAL INSURANCE COMPANY,
20 a Massachusetts corp.; AMERICAN
21 GUARANTEE & LIABILITY INSURANCE
22 COMPANY, a New York corp.; and DOES 1 -
23 15,

Defendants.

CASE NO.

AMERICAN GUARANTEE &
LIABILITY INSURANCE COMPANY'S
NOTICE OF JOINDER IN REMOVAL
OF CIVIL ACTION

21 Defendant American Guarantee & Liability Insurance Company. hereby joins in co-
22 defendant Insurance Company of the State of Pennsylvania's Notice of Removal of Civil Action
23 Under 28 U.S.C. Section 1332 and 1441(a) [Diversity Jurisdiction].

24 Dated: December 8, 2004

SINNOTT, DITO, MOURA & PUEBLA

By

DEBRA PUEBLA
Attorneys for Defendant
AMERICAN GUARANTEE & LIABILITY INS.
COMPANY

11735

-1-

NOTICE OF JOINDER IN REMOVAL OF CIVIL ACTION

CASE NAME: Kenyon Const., Inc. v. American Safety Risk Retention Group, Inc., et al.
ACTION NO.:

PROOF OF SERVICE

I am a citizen of the United States. My business address is 203 Redwood Shores Pkwy., Ste. 480, Redwood Shores, California 94065. I am employed in the County of San Mateo where this service occurs. I am over the age of 18 years, and not a party to the within cause. I am readily familiar with my employer's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business.

On the date set forth below, following ordinary business practice, I served a true copy of the foregoing document(s) described as:

**AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY'S NOTICE
OF JOINDER IN REMOVAL OF CIVIL ACTION**

- ☐ (BY FAX) by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.
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Jennifer S. Cohn, Esq.
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Attorneys for Plaintiffs
KENYON CONSTRUCTION, INC. and
KENYON PLASTERING, INC.

Attorneys for Defendant
AMERICAN SAFETY RISK
RETENTION GROUP, INC.

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 Facsimile: (310) 824-4548

Attorneys for Defendant
AMERICAN GUARANTEE &
LIABILITY INSURANCE COMPANY

Attorneys for Defendant
LIBERTY MUTUAL INSURANCE
COMPANY

- ☒ (Federal) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 10, 2004, at Redwood City, California.


 Abigail Bowman

EXHIBIT 4

HAYES DAVIS

PAGE 03/03

12/06/2004 14:09 1

1 HANK WEINBLATT (SBN 117308)
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4 Los Angeles, CA 90034
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7 Attorneys for Defendant
8 AMERICAN SAFETY RISK RETENTION GROUP, INC.

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 KENYON CONSTRUCTION, INC., an Arizona
12 corp., and KENYON PLASTERING, INC., a
13 California corp.,

14 Plaintiffs,

15 v.

16 AMERICAN SAFETY RISK RETENTION
17 GROUP, INC., a Vermont corp., AMERICAN
18 SAFETY CASUALTY INSURANCE
19 COMPANY, a Delaware corp.; THE
20 INSURANCE COMPANY OF THE STATE OF
21 PENNSYLVANIA, Pennsylvania corp.;
22 LIBERTY MUTUAL INSURANCE COMPANY,
23 a Massachusetts corp.; AMERICAN
24 GUARANTEE & LIABILITY INSURANCE
25 COMPANY, a New York corp.; and DOES 1 -
26 15,

27 Defendants.

CASE NO.

AMERICAN SAFETY RISK
RETENTION GROUP INC.'S NOTICE
OF JOINDER IN REMOVAL OF CIVIL
ACTION

28 Defendant American Safety Risk Retention Group, Inc. hereby joins in co-defendant
Insurance Company of the State of Pennsylvania's Notice of Removal of Civil Action Under 28
U.S.C. Section 1332 and 1441(a) [Diversity Jurisdiction].

29 Dated: December 10, 2004

DALE, BRADEN & HINCHCLIFFE

By

HANK WEINBLATT
Attorneys for Defendant
AMERICAN SAFETY RISK RETENTION
GROUP, INC.

CASE NAME: Kenyon Const., Inc. v. American Safety Risk Retention Group, Inc., et al.
ACTION NO.:

PROOF OF SERVICE

I am a citizen of the United States. My business address is 203 Redwood Shores Pkwy., Ste. 480, Redwood Shores, California 94065. I am employed in the County of San Mateo where this service occurs. I am over the age of 18 years, and not a party to the within cause. I am readily familiar with my employer's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business.

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AMERICAN SAFETY RISK RETENTION GROUP INC.'S NOTICE OF JOINDER IN REMOVAL OF CIVIL ACTION

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KENYON CONSTRUCTION, INC. and
KENYON PLASTERING, INC.

Attorneys for Defendant
AMERICAN SAFETY RISK
RETENTION GROUP, INC.

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Attorneys for Defendant
AMERICAN GUARANTEE &
LIABILITY INSURANCE COMPANY

Attorneys for Defendant
LIBERTY MUTUAL INSURANCE
COMPANY

- ☒ (Federal) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 10, 2004, at Redwood City, California.


 Abigail Bowman

CASE NAME: Kenyon Const., Inc. v. American Safety Risk Retention Group, Inc., et al.
ACTION NO.:

PROOF OF SERVICE

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On the date set forth below, following ordinary business practice, I served a true copy of the foregoing document(s) described as:

NOTICE OF REMOVAL OF CIVIL ACTION UNDER 28 U.S.C. SECTIONS 1332 AND 1441(a) [DIVERSITY JURISDICTION]; DEMAND FOR JURY TRIAL

- ☐ (BY FAX) by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.
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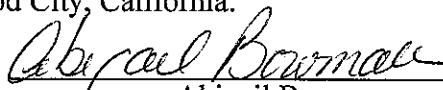
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 Facsimile: (310) 824-4548

Attorneys for Defendant
AMERICAN GUARANTEE &
LIABILITY INSURANCE COMPANY

Attorneys for Defendant
LIBERTY MUTUAL INSURANCE
COMPANY

- ☒ (Federal) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 10, 2004, at Redwood City, California.


 Abigail Bowman